

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)



VOLUME 47 NUMBER 12

PAGES 1759 - 1816

DECEMBER 1988

Compiled And Published By:

Editors, Agriculture Decisions

Hearing Clerk Unit

Office of Administrative Law Judges

U.S. Department of Agriculture

Room 1081 South Building

Washington, D.C. 20250-9200

Telephone (202) 447-4443

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to the address indicated above.

PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. § 151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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ANIMAL QUARANTINE AND RELATED LAWS

In re: ALL-AIRTRANSPORT, INC.

A.Q. Docket No. 89-06.

Order Dismissing Complaint filed December 28, 1988.

Patrice Harps, for Complainant.

Daniel Lenham, Washington, D. C., for Respondent.

Order issued by Paul Kane, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Complaint counsel moved on December 20, 1988 to dismiss the complaint herein.

Accordingly, and for the reasons stated therein, complaint counsel's motion is granted, and the complaint in this matter is dismissed.

In re: CARROLL HESTER.

A.Q. Docket No. 88-15.

Decision and Order filed November 9, 1988.

Interstate movement of cattle without required certificate--admission of material allegations.

Sheila Novak, for Complainant.

Respondent, pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle (9 C.F.R. Part 78), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted by a complaint filed on June 28, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about December 8, 1985, the respondent moved interstate approximately four (4) cattle, over twenty-four months of age, from Coatsburg, Illinois, to Bloomfield, Iowa, in violation of section 78.9 (b) (3) (ii) of the regulations (9 C.F.R. 78.9 (b) (3) (ii)) because the cattle were not accompanied interstate by a certificate, as required. The complaint also alleged that on or about January 20, 1987, the respondent moved interstate approximately five (5) "S" branded cattle, which originated in a Class B state, from Bloomfield, Iowa, to Coatsburg, Illinois, in violation of section 78.9 (c) (1) (iv) (C) of the

regulations (9 C.F.R. § 78.9 (c) (1) (iv) (C) because the cattle were not accompanied by an "S" brand permit, as required.

In response to the complaint, respondent filed an undated letter in which he admitted moving four (4) cattle interstate from Illinois to Iowa in December, 1985 without a health certificate. He also admitted that on or about January 20, 1987, he moved five (5) "S" branded cattle from Iowa to Illinois, and explained that the information required by an "S" brand permit was recorded on a different form which accompanied the animals.

For purposes of issuing this Decision and Order, the complainant has withdrawn the allegation that respondent violated 9 C.F.R. § 78.9 (c) (1) (iv) (C) by moving interstate five (5) "S" branded cattle from Iowa to Illinois because the cattle were not accompanied by a "S" brand permit.

In view of the aforementioned facts, respondent has admitted the material allegations in the complaint, as amended, and, therefore, respondent has waived his right to a hearing pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent has admitted, are adopted and set forth herein as the Findings of Fact and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Carroll Hester, respondent, is an individual whose address is Route 1, Quincy, IL 62301.

2. On or about December 8, 1985, the respondent moved interstate approximately four (4) cattle, over twenty-four months of age, from Coatsburg, Illinois, to Bloomfield, Iowa, in violation of section 78.9 (b) (3) (ii) of the regulations (9 C.F.R. § 78.9 (b) (3) (ii) because the four (4) cattle were not accompanied interstate by a certificate, as required.

Conclusions

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 78.9 (b) (3) (ii) of the regulations (9 C.F.R. § 78.9(b) (3) (ii)).

Therefore, the following Order is issued.

Order

The respondent, Carroll Hester, is hereby assessed a civil penalty of one thousand dollars (\$1,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be sent to "USDA, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403", within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 88-15.

CARROLL HESTER

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final December 27, 1988.--Editor.]

ANIMAL WELFARE ACT

In re: ED HOPFENSBERGER.

AWA Docket No. 432.

Decision and Order filed September 22, 1988.

Purchase and sale of dogs without requisite license--failure to appear at hearing.

Robert Ertman, for Complainant.

Respondent, pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a proceeding brought pursuant to the Animal Welfare Act, as amended (7 U.S.C. § 1.1 *et seq.*) against respondent for operating as an animal dealer without a requisite license. The complaint was filed on August 24, 1987. An answer was filed on October 14, 1987, on respondent's behalf by Steven R. Wiechman, attorney. Several telephone conferences were subsequently held in which settlement efforts were discussed. In a telephone conference of July 20, 1988, it was decided that a hearing should be scheduled in Kansas City, Missouri, on September 20, 1988. On September 1, 1988, a notice of the hearing location was issued to counsel for the parties. At approximately the same time, Mr. Wiechman filed a motion to withdraw as respondent's counsel because of respondent's refusal to cooperate and keep in contact with him. On September 6, 1988, I held a telephone conference with the respondent, Ed Hopfensperger and complainant's counsel. As stated in the summary of that telephone conference, filed on September 14, 1988, Mr. Hopfensperger advised that he would attempt to settle the case the next day. I instructed him that if he did not advise my secretary that a settlement had been achieved, it was understood that he would appear at the hearing *pro se*, and personally defend himself.

He did not contact my secretary and Mr. Ertman, counsel for complainant, advised that respondent did not attempt to settle the case on a voluntary basis as he had promised.

The September 14, 1988 summary reiterated that the hearing would be held in Kansas City on September 20, 1988, and specified the precise time when it would begin and the exact place where it would be held.

My secretary personally called Mr. Hopfensperger and explained these details to him. (See ALJ Exhibit 1). Additionally, Mr. Dale Wiseman, an official of the Department's Animal Health and Inspection Service, personally served a copy of the summary upon Mr. Hopfensperger (See ALJ Exhibit 2).

Accordingly, the oral hearing took place as scheduled on September 20, 1988. It started at 9:30 a.m. as respondent had been advised. It ended at 11:00 a.m. Mr. Hopfensperger elected to not attend.

The violations are serious ones that strike to the heart of the Animal

Welfare Act. The evidence showed that Mr. Hopfensperger while unlicensed, bought and sold dogs from and to dealers in interstate commerce. As Mr. Wiseman testified, because respondent was unlicensed his facilities could not be officially inspected and the Act's purposes of assuring that animals sold nationally are treated humanely and kept healthy, was thereby thwarted.

The evidence of record shows that on July 4, 1985, respondent violated the Act 21 times by purchasing 21 dogs while unlicensed for resale to a dealer. He was personally notified of the Act's licensing requirements in January 1986. He continued to operate without a license and thereafter committed 38 further violations of the Act by selling 38 dogs to various dealers. Complainant has recommended that in addition to the entry of a cease and desist order, respondent be assessed a civil penalty of \$10,000 and prohibited for five years from engaging in business in any capacity for which a license is required under the Act. I have concluded that the proposed sanction is appropriate and should be entered.

Findings and Conclusions

1. Respondent, Ed Hopfensperger is an individual whose address is Route 2, Valley Falls, Kansas 66608, and who, at all times material herein: (a) was a dealer within the meaning of the Animal Welfare Act; and (b) was not licensed.

2. Respondent was personally notified of the licensing requirements of the Act in January 1986. Notwithstanding notice of the licensing requirements, no application was made by respondent. During the period from July 1985 through May 1987, the respondent operated in violation of Section 4 of the Act (7 U.S.C. § 2134) and Section 2.1 of the regulations (9 C.F.R. § 2.1) in that he engaged in business as a dealer without being licensed. Specifically, he purchased and sold dogs in transactions in which he was required to be licensed as follows:

a) On July 4, 1985, Respondent purchased 21 dogs from William A. Blanton. (21 violations).

b) On March 21, 1986, Respondent sold 14 dogs to Harley Smith, d/b/a "Yockey Creek Kennels." (14 violations).

c) On December 13, 1986, Respondent sold 4 dogs to Paul and Sharon Munk d/b/a, "B.J.'s and Guys" (4 violations).

d) On March 7, 1987, Respondent sold 7 dogs to Paul and Sharon Munk, d/b/a, "B.J.'s and Guys" (7 violations).

e) On May 2, 1987, Respondent sold 7 dogs to Paul and Sharon Munk, d/b/a, "B.J.'s and Guys" (7 violations).

f) On May 15, 1987, Respondent sold 3 dogs to Paul and Sharon Munk, d/b/a, "B.J.'s and Guys" (3 violations).

g) On May 26, 1987, Respondent sold 1 dog to Paul and Sharon Munk, d/b/a "B.J.'s and Guys" (1 violation).

h) On June 4, 1987, Respondent sold 2 dogs to Paul and Sharon Munk, d/b/a "B.J.'s and Guys" (2 violations).

3. It is appropriate in these circumstances to enter a cease and desist order and, additionally, to impose a \$10,000 civil penalty and prohibit respondent for 5 years from engaging in any business for which a license is required under the Act and the regulations.

Order

1. Respondent, Ed Hopfensperger, his agents and employees, directly or through any corporate or other device, shall cease and desist from any violation of the Animal Welfare Act and the regulations and standards issued thereunder, and in particular shall cease and desist from failing to apply for and obtain a license under the Animal Welfare Act before operating in any capacity for which a license is required under the Act and the regulations issued thereunder.

2. Respondent, Ed Hopfensperger, is prohibited for a period of five (5) years from engaging in business in any capacity for which a license is required under the Animal Welfare Act and the regulations issued thereunder. The respondent may apply for a license five (5) years from the effective date of this decision.

3. A civil penalty of \$10,000 is assessed against Respondent, Ed Hopfensperger, which shall be made payable to the order of the Treasurer of the United States and sent to Robert A. Ertman, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service.

[This decision and order became final December 1, 1988 -- Editor]

PACKERS AND STOCKYARDS ACT

In re: HERBERT P. (BUDDY) HEAD.
P.& S. Docket No. D-89-5.
Order of Dismissal filed December 15, 1988.

Peter V. Train, for Complainant.

Respondent, pro se.

Order of Dismissal issued by Edwin S. Bernstein, Administrative Law Judge.

ORDER OF DISMISSAL

For good cause shown, and at complainant's request, the complaint herein is dismissed.

In re: TOMMY MAYBERRY.
P.& S. Docket No. D-89-10.
Supplemental Order filed December 19, 1988.

Edward M. Silverstein, for Complainant.

Respondent, pro se.

Supplemental Order issued by Edwin S. Bernstein, Administrative Law Judge.

SUPPLEMENTAL ORDER

On this date, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

IT IS HEREBY ORDERED that the suspension provision of the order issued this date is terminated. The order shall remain in full force and effect in all other respects.

In re: W and W ARAB STOCKYARDS, INC.
P. & S. Docket No. D-88-51.
Supplemental Order filed December 27, 1988.

Ben E. Bruner, for Complainant.

Robert C. Barnett, Birmingham, AL.

Supplemental Order issued by Paul N. Kane, Administrative Law Judge.

SUPPLEMENTAL ORDER

On November 25, 1988, an order was issued in the above-captioned matter, *inter alia*, suspended respondent as a registrant under the Act for a period of 21 days and thereafter until the respondent corrected the shortage in its custodial account.

The respondent has demonstrated that its custodial account is now in conformity with the Packers and Stockyards Act. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued November 25, 1988, is terminated. The order shall remain in full force and effect in all other respects.

REPARATION DECISION

KENNETH HUSTEAD v. GREEN CITY LIVESTOCK MARKET INC.
P. & S. Docket No. 6912.

Decision and Order filed December 1, 1988.

Complainant, pro se.

Respondent, pro se.

Peter Train, Presiding Officer.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) begun by a complaint filed on January 23, 1987, by Kenneth Hustead, alleging that he sold 14 head of cattle to David Bochner on November 10, 1986, for which he had not received payment. The complaint sought reparation against Green City Livestock Market, Inc., in the amount of \$4,379.73.

A copy of the complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant. A supplemental report of investigation was prepared by Department officials and served on the parties on August 26, 1988.

Respondent filed an answer in which it denied any liability and asserted that the transaction in question involved the purchase of livestock by David Bochner for his own personal use.

Since the amount claimed in damages does not exceed \$10,000.00, a written hearing as provided in Rule 13 of the Rules of Practice was held. (9 C.F.R. § 202.113) Pursuant to such procedure, the parties were given an opportunity to submit additional evidence. Complainant did not submit any additional evidence. Respondent filed additional documents which will not be considered as evidence since the documents were unverified. Neither party filed a brief.

Findings of Fact

1. Complainant, Kenneth Hustead, hereinafter referred to as the complainant, is an individual whose address is P.O. Box 3, Baring, Missouri 63531.

2. Complainant is, and at all times material herein was, engaged in the business of a dealer buying and selling livestock in commerce for his own account and in the business of a market agency buying livestock in commerce on a commission basis and is so registered with the Secretary of Agriculture.

3. Respondent Green City Livestock Market, Inc., hereinafter referred to as respondent, is a corporation whose business mailing address is P.O. Box

186, Green City, Missouri 63545.

4. Respondent is, and at all times material herein was engaged in the business of a market agency selling livestock in commerce on a commission basis and in the business of a dealer buying and selling livestock in commerce for its own account and is so registered with the Secretary of Agriculture.

5. On November 10, 1986, complainant sold 14 cows to David Bochner, respondent's president. The invoice price was \$4,379.73.

6. Complainant has yet to receive payment for these cows.

7. The complaint herein was filed within 90 days of accrual of the cause of action herein.

Conclusions

The dispute in this case concerns the question of who is the proper respondent. Green City Livestock Market claims that the purchase was made by David Bochner in his individual capacity. Complainant, however, named the corporation as the respondent. It is well established that complainant has the burden of proof to show by the preponderance of the evidence that he has been damaged by a violation of the Packers and Stockyards Act by the named respondent. *See, e.g., Lambert v. Moran*, 37 Agric. Dec. 1191 (1978).

It is clear from a review of the record herein that complainant has failed to meet its burden to show Green City was the purchaser for a number of reasons. First, the complaint itself states "David Bochner brought 14 cows on 11-10-86..." Second, the invoice lists Bochner as the purchaser and not Green City Livestock Market. Additionally, previous and apparently similar purchases were paid for with Bochner's personal check, not a corporate check.

The supplemental report of investigation contains an affidavit of complainant Hustead in which he states that he bought cattle "for resale to David Bochner doing business as Green City Livestock Market, Inc., Green City, Mo." Hustead states the refusal to pay for the cattle was the result of an offset taken because of a loss suffered by the market four years previously. He therefore, claims he was dealing with the market, not David Bochner in his individual capacity. Respondent denies that the offset taken was because of the transaction in 1982, and argues, rather, that the offset was the result of the loss of 12 head and a large vet bill on transactions in September and October 1986, transactions which it claims were individual transactions of David Bochner. If an offset was going to be taken because of 1982 transactions, it is likely that it would be taken on the very first transactions in October. Accordingly, we find respondent's argument that the 1982 transaction was not part of the offset to be more credible.

The evidence of record, therefore, does not support a finding that Green City Livestock Market, Inc., was involved in the transaction in question. Accordingly, the complaint must be dismissed.

On jurisdiction to issue this order, *see Rice v. Wilcox*, 630 F.2d 586 (8th Cir. 1980); *Mid-south Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 315 N.W. 2d 229 (1982).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, 42 F.R. 4395, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. § 450c-450g. *See also*, Reorganization Plan No. 2 of 1953 (5 U.S.C., 1976 Ed. appendix p. 764).

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice (9 C.F.R. § 202.117).

On a complainant's right to judicial review of such an order, see 5 U.S.C. § 702-3 and *United States v. ICC*, 377 U.S. 426 (1949).

Order

The complaint herein is dismissed.

Copies hereof shall be served on the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

UNIVERSAL FRUIT COMPANY INCORPORATED,
AN ILLINOIS CORPORATION, Plaintiff, v.
WINDWARD MANAGEMENT COMPANY OF ILLINOIS,
INC., and CARSON PIRIE SCOTT & COMPANY., defendants.
Docket No. 88 C 5948.
Decided December 14, 1988.

PACA statutory trust--unpaid seller may impress statutory trust only upon funds held by a buyer in privity of contract with the seller.

Under the trust provisions of the PACA, an unpaid seller's priority claim extends only to accounts receivable held by those in privity of contract with the seller. The PACA trust provisions are analogous to those of the Packers and Stockyards Act. And the legislative history of the PSA indicates that privity of contract was contemplated in that trust scheme. Moreover, the requirement of privity assures an orderly and equitable distribution of funds by concentrating the trust corpus. A central fund obviates the need for an unpaid seller to identify non-privity buyers and notify them of its intent to preserve trust assets.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MEMORANDUM OPINION

This case comes before us on the motion of defendant Carson Pirie Scott & Company ("Carson") to dismiss. We grant the motion.

Facts

For purposes of this motion, we accept as true the allegations of the plaintiff and draw all reasonable inferences therefrom. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). We read the complaint as follows: Plaintiff Universal Fruit Company Incorporated ("Universal") is an agricultural commodities seller. Defendants Windward Management Company of Illinois, Inc. ("Windward") and J. Bildner & Sons, Inc. ("Bildner") are dealers in perishable agricultural commodities. Between October 1987 and March 31, 1988, Universal delivered perishable goods on credit to Windward and Bildner. As of the date of receipt of last payment, Windward and Bildner owed Universal the principal sum of \$40,752.53.

Defendants Windward and Bildner sold perishable agricultural goods to defendant Carson. Universal alleges, "on Information and belief," that Carson presently owes sums of money to Windward and Bildner resulting from these sales. Complaint at ¶ 3. We infer, and Carson does not dispute, that Universal has complied with all notice requirements.

Discussion

Universal seeks direct payment from Carson of any monies owed by Carson to Windward and Bildner in connection with the sale of perishable agricultural commodities. Universal premises its request on the trust provisions of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a *et seq.*, specifically § 499e (c) (2), which provides, in relevant part, as follows:

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transaction has been received by such unpaid suppliers, sellers, or agents.

In response, Carson contends that it is not subject to the statutory trust because it is not a "commission merchant," "dealer" or "broker" within the meaning of 7 U.S.C. § 499e (C) (2).¹

This case presents a question of first impression. It is well established that, under PACA, an unpaid seller may impress a statutory trust against the immediate buyer. *In Re Fresh Approach*, 51 Bankr. 412 (Bank. N.D. Tex. 1985). However, whether PACA trust protection extends beyond the immediate buyer is not expressly indicated in the Act. For the following reasons we hold that privity of contract must exist between the supplier-seller and the buyer for the statutory trust provisions to apply to the buyer.

The PACA trust provisions were enacted "to increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received by them." H.R. No. 98-543, 98th Cong., 2d Sess. 2, *reprinted in* 1984 Code of Cong. & Admin. News 405, 406 ("House Report"). Congress intended to give suppliers and sellers priority over other creditors in a bankruptcy proceeding. *Id.* To achieve this goal, PACA imposes a trust for the benefit of unpaid sellers on produce and

¹ Section 499a defines these terms as follows:

(5) The term "commission merchant" means any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another;

(6) The term "dealer means any person engaged in the business of buying or selling in wholesale or jobbing quantities... except that ... (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of \$230,000...

(7) the term "broker means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser....

produce-related assets held by produce merchants, dealers and brokers. The trust continues until the suppliers are paid. 7 U.S.C. § 499e.

Because Congress contemplated the commingling of trust assets, PACA provides a "non-segregated floating trust" which applies to all of the buyer's produced-related inventory and proceeds thereof, regardless of whether the trust beneficiary was the source of the inventory and proceeds thereof. House Report at 4; *In Re Fresh Approach*, 51 Bankr. at 422. Any money that Carson now owes to Windward and Bildner is an account receivable of Windward and Bildner, and the account receivable as noted, is subject to the PACA trust. In our view, Universal's priority claim extends only to the accounts receivable held by Windward and Bildner, and not to Carson.

Our conclusion that privity must exist is supported by the analogous trust provisions of the Packers and Stockyard Act ("PSA"). 7 U.S.C. § 196 *et al.* PSA also imposes a trust in favor of unpaid seller on the inventory of commodities and products derived therefrom and on the proceeds from the sale of such commodities in the hands of the commission merchant, dealer or broker. Congress looked to the trust provisions of PSA as a model for PACA.² House Report at 4; *In Re Fresh Approach*, 51 Bankr. at 419, n.4 ("Congress directed courts to look to case law developed under PSA for guidance as to proceedings arising under PACA").

The analogous provision of PSA reads in pertinent part:

(b) All livestock purchased by a packer in cash sales and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, *shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers....*

7 U.S.C. § 196 (b) (emphasis added).

Clearly, the PSA contemplates that there must be privity of contract between original seller and buyer for the trust to attach.

The legislative history of PSA also supports a privity requirement.

On the floor of the Senate, the following exchange took place:

The Committee did not intend that the trust provisions, section 8, extend to the meats or meat food products purchased (and held) by retailers from the packer in good faith transactions; but rather, that the trust would attach to the accounts receivable, cash (or equivalent) or proceeds

² Like PACA, Congress intended the PSA trust provisions to undercut the favored position that secured lenders have over unpaid sellers in bankruptcy proceedings. *In Re Gotham Provision Co., Inc.*, 669 F.2d 1000, 1008 (5th Cir. 1982).

received by the packer in payment for such products. For purposes of conveying the practical effects of such a procedure to the Membership on the effects of such a procedure to the Membership on the floor, could you explain how this would work and whether or not you believe this would work a hardship on the packers or the retail purchasers?

ANSWER: The committee Report 94-1043 states at page 7 that: "The trust does not extend to livestock, meats, etc., which have been purchased from the packer in good faith transactions"... The packer or the livestock seller would not be adversely affected by the fact that the trust would be applicable only with respect to the meat, meat food products, and livestock products *in the possession of the packer*, and then to the packer's account receivable for the sale of the products, and then to the proceeds paid by the retailer to the packer to satisfy the account receivable.

122 Congressional Rec. S 18825 (daily ed. June 17, 1976),³ (emphasis added) [quoted in *Re Frosty Mom Meats, Inc.*, 7 Bankr. 988 (Bankr. M.D. Tenn. 1980).⁴ By analogy, Carson is not itself subject to the trust provisions of PACA, although any money paid by Carson to a commission merchant, dealer or broker, such as Woodward and Bildner, and arising out of the purchase of agricultural commodities would be part of the trust *res*.

Furthermore, the equities argue in favor of requiring privity between supplier and buyer. Concentrating the trust corpus would permit all unpaid

³ Reply of Department of Agriculture, Packers and Stockyards Administration to question asked by Representative Charles Thone.

⁴ Also noteworthy is the following exchange on the House floor:

Mr. Bergland: [D]id the committee intend the trust provisions under Section 8 would extend to the meats or meat food products purchased and held by the retailers in a good faith transaction?

Mr. Thone: No. In those cases the trust would attach to the accounts receivable or proceeds received by the packer in exchange for such products.

sellers to look to a central fund for immediate payment, rather than track down the produce or its proceeds. Providing a central fund is particularly important in light of *Finest Fruits, Inc. v. Korean Products Corp.* No. 87 C 62 (S.D.N.Y. Sept. 6, 1988). The *Finest* court held that, where the buyer had insufficient funds to satisfy the trust claims of all unpaid suppliers, the buyer received a *pro rata* distribution of available trust assets. We do not believe that Congress intended a "race to the assets" by some unpaid suppliers at the expense of others.

Moreover, if we were to consider non-privy buyers as merchants, dealers or brokers under PACA, then under the terms of PACA, an unpaid seller-supplier would have to notify non-privy buyers within strict time limits of intent to preserve trust assets.⁵ This, in turn would occasion a scramble by unpaid sellers to ascertain the identity of non-privy buyers and involve precisely the same tracing that Congress sought to avoid by its creation of this unusual "non-segregated floating trust." Those who failed to file timely notice with the non-privy buyer would be excluded from participation in the trust assets held by that non-privy buyer. We believe that Congress intended a more orderly and equitable distribution of trust funds in the hands of the original buyer.⁶

⁵ This notice provision of PACA reads in pertinent part:

(3) The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary within thirty calendar days (i) after expiration of the time prescribed by which payment must be paid, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored....

7 U.S.C. § 499e (c) (3). It should be noted that courts have strictly construed the notice provision of the statute. For example, in *In Re Marvin Properties*, 854 F.2d 1183 (9th Cir. 1988), an unpaid seller sent notice of intent to preserve trust assets to the unpaid seller's agent, who then sent notice of intent to preserve trust assets to the Secretary of Agriculture of Agriculture. The Secretary then sent a copy of the letter to the debtor. The court held that this was insufficient notice of intent because § 499e(c) (3) mandated that an unpaid seller should send notice directly to the debtor. *id.* at 1186.

⁶ Nor do we believe that our holding will undermine the purpose of PACA. The trust provisions have built-in safeguards which ensure the integrity of the trust *res*. Specifically, PACA authorizes the Secretary of Agriculture to prevent dissipation of the assets of the trust by bringing suit against a broker in the United States District Court. 7 U.S.C. § 499e(c) (4). In addition, the Secretary may bring an action to recover trust assets which have been transferred to a third party. *Lyng v. Pellegrino & Sons, Inc.*, 86 C 1534 (D. Mass. Aug. 30, 1988). Further, as noted above, the notice provisions of PACA will require unpaid producers to notify the commodity merchant, broker, or dealer and the Secretary of Agriculture in order to preserve their benefit to the trust. 7 U.S.C. § 499e(c) (3). This will also permit rapid determination of the scope of the debtor's estate and facilitate speedy payment to the supplier.

Conclusion

We grant Carson's motion to dismiss.

DISCIPLINARY DECISIONS

In re: ATLANTIC PRODUCE, INC. and ATLANTIC PRODUCE.
PACA Docket No. 2-7577.
Decision and Order filed October 17, 1988.

Failure to make full payment promptly--failure to file answer.

Edward Silverstein, for Complainant.

Respondent, pro se.

Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on May 4, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October 1986 through October 1987, the corporate respondent and/or the partnership respondent purchased, received, and accepted, in interstate and foreign commerce, from 44 sellers, 124 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$171,891.30.

Copies of the complaint were served upon respondents but neither respondent has filed an answer. The time for filing answers having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Atlantic Produce, Inc., the "corporate respondent," is a corporation, whose address is 95 North West 13th Avenue, Pompano Beach, Florida 33069; respondent Atlantic Produce, the "partnership respondent," is a partnership consisting of Barrie Kellner, Karl Kellner, and Mel Winick, whose address also is 95 North West 13th Avenue, Pompano Beach, Florida 33069.

2. The corporate respondent has never been licensed under the Act, but it conducted business subject to the Act as a dealer, as that term is defined in section 1 (6) of the Act (7 U.S.C. § 499a (6)) during at least the period October 1986 through October 1987. Messrs. Barrie Kellner, Karl Kellner, and Mel Winick, each of whom is either an officer, director and stockholder of the corporate respondent, were issued a license under the Act, number 860972, as a partnership doing business as Atlantic Produce, on April 11, 1986. This license was subject to renewal on or before April 11, 1988, but was automatically suspended, on November 3, 1987, pursuant to section 7

of the Act (7 U.S.C. § 499g (d) when the partnership respondent failed to satisfy a reparation award issued against it in PACA Docket No RD-87-492.

3. As more fully set forth in paragraph 5 of the complaint, during the period October 1986 through October 1987, the corporate respondent and/or the partnership respondent purchased, received, and accepted in interstate and foreign commerce, from 44 sellers, 124 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$171,891.30.

Conclusion

Respondent's failure to make full payment promptly with respect to the 124 transactions set forth in Finding of Act No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Atlantic Produce, Inc., has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above shall be published.

The license issued to Barrie Kellner, Karl Kellner and Mel Winick, a partnership d/b/a Atlantic Produce, under the Perishable Agricultural Commodities Act is revoked.

This order shall take effective on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and § 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final on December 5, 1988. -Editor]

In re: H.D.K. CORPORATION, INC., d/b/a BIG K PRODUCE.
PACA Docket No. D-88-522.
Decision and Order Filed October 17, 1988.

Failure to make full payment promptly--failure to file answer.

Edward M. Silverstein, for Complainant.

Respondent, pro se.

Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on April 15, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period April 1986 through May 1987, respondent purchased, received, and accepted, in interstate and foreign commerce, from 15 sellers, 393 lot of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$170,348.18.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complaint for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, H.D.K. Corporation, Inc., d/b/a Big K Produce, is a corporation, whose address is 200 E. North Vacek, Fort Worth, Texas 76107.

2. Respondent, which has never been licensed under the Act, conducted business subject to the PACA as a dealer as that term is defined in section 1 (6) of the Act (7 U.S.C. § 499a (6)), during at least the period April 1986 through May 1987. Respondent's president, director and sole stockholder, Harvey D. Kitchens, was issued a license under the Act to do business as Big K Produce, Number 780865, on March 7, 1978. This license was renewed annually, but terminated on March 7, 1978. This license was renewed annually, but terminated on March 7, 1988, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Mr. Kitchens failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period April 1986 through May 1987, respondent purchased, received, and accepted interstate and foreign commerce, from 15 sellers, 393 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total of \$170,348.18.

Conclusions

Respondent's failure to make full payment promptly with respect to the 393 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and

repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and § 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final on December 5, 1988.-Editor]

In re: J. SEGARI AND COMPANY, INC.,

PACA Docket No. D-88-515.

Decision and Order filed September 23, 1988.

Failure to make full payment promptly--failure to maintain sufficient assets in trust--failure to file answer.

Ben E. Bruner, for Complainant.

Respondent, pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 22, 1988, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1985 through November 1986, respondent purchased, received, and accepted, in interstate and foreign to make full payment promptly of the agreed purchase prices, in the total amount of \$352,048.90. It is also alleged that with respect to those transactions, 12 of the unpaid sellers filed timely trust notices pursuant to section 5(c) of the PACA (7 U.S.C. § 499c(c)), but the respondent failed to maintain sufficient assets in the trust to satisfy their claims.

A copy of the complaint was served upon respondents which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant

to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. The mailing address of J. Segari and Company, Inc., (hereinafter "Respondent"), is 7018 Washington Ave., New Orleans, Louisiana 70124.

2. Pursuant to the licensing provisions of the Act, license number 730945 was issued to respondent on February 6, 1973. This license was renewed annually, but terminated on February 6, 1987, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period September 1985 through November 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from sellers, 162 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$352,048.90.

4. As more fully set forth in paragraph 6 of the complaint, 12 of the unpaid sellers listed in paragraph 5 of the complaint filed timely trust notices pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)) but, the respondent failed to maintain sufficient assets in the trust to satisfy their claims.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3 and 4 above, constitutes wilful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

The facts and circumstances of the violations of the PACA set forth in this Decision shall be published.

This Order shall take effect on the first day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and § 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final December 1, 1988 --Editor]

REPARATION DECISIONS

**ARKANSAS VALLEY PRODUCE OF TEXAS, INC. v. VERTICAL
INTEGRATED PROCESSING, a/t/a BELMONT PACKING CO.**

PACA Docket No. R-88-267.

Order filed December 7, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

This is a reparation proceeding under the Perishable proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)

By letter dated September 30, 1988, complainant notified the Department that a settlement between the parties had been reached. Complainant, in its letter of September 30, 1988, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

BONITA PACKING CO., INC., v. TAM PRODUCE INC.

PACA Docket No. 2-7474.

Order filed December 6, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

On October 31, 1988, complainant filed a letter in the above-captioned matter confirming that the parties had reached a full settlement and that the agreed-upon payment had been received complainant. Complainant has authorized dismissal of the complaint. Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

J.R. BROOKS & SON, INC. v. EXOTIC FRUIT IMPORTERS, INC.
PACA Docket No. R-88-261.
Order filed December 6, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*)

By letter dated October 18, 1988, complainant notified the Department that it and respondent had agreed to an amicable settlement of this matter. The presiding officer notified the complainant that, if the parties had settled it would be appropriate to dismiss its complaint. He, therefore, gave the complainant an opportunity to show cause why its complaint should not be dismissed.

Complainant failed to file any response thereto.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

CALIFORNIA PRODUCE DISTRIBUTORS, INC. v. GUS' WHOLESALE
MEAT & FOOD CO.
PACA Docket No. 2-6927.
Order filed December 6, 1988.

Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) The Department was notified that respondent had filed a petition in bankruptcy. Accordingly, on October 1, 1986, this matter was stayed pending completion of respondent's bankruptcy. Having heard nothing further, on November 20, 1987, the Presiding Officer suggested to the Complainant that it would be appropriate to dismiss its complaint because the matter was undoubtedly resolved by the Bankruptcy Court. The suggestion was, finally, served on Complainant's counsel on October 17, 1988, and complainant was given an opportunity to object to it but did not do so.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

CHAPARRAL FRUIT SALES, INC. v. GREAT AMERICAN FOODS, INC.
PACA Docket No. 2-7488.
Order filed December 7, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

A Decision and Order in this proceeding was entered in favor of complainant on October 18, 1988. On November 17, 1988, respondent filed a letter which we are treating as a Petition for Reconsideration. Respondent raised no issues which merit consideration. Therefore, its Petition is dismissed without prior service on complainant. The original Order remains in effect.

HORWATH & ASSOCIATES, INC. v. SALVATORE TALAMO, d/b/a
GOLDEN VALLEY FOODS.
PACA Docket No. R-88-34.
Decision and Order filed December 7, 1988.

Complainant, pro se.

J. Robert Foster, Esq., Morgan Hill, California, for Respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant \$3,720.00, with interest thereon at the rate of 13% per annum from February 1, 1987, until paid.

Copies of this order shall be served upon the parties.

[This decision and order became final December 7, 1988.--Editor]

J.S. MCMANUS PRODUCE CO., INC. v. SPANDA DIST. CO., INC.
PACA DOCKET NO. 2-7192.
Order on Reconsideration filed December 7, 1988.

Order on Reconsideration issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued April 28, 1988, awarding reparation to complainant against respondent

subsequent to the negotiation of the sale of the goods. Because of this respondent is liable for the full purchase price of the goods less any damages it may have suffered. By unloading the goods and selling them it continued to act under the original contract.

With respect to damages we note that there were 19% condition defects, which are in excess of the condition defects allowed at destination for lettuce under a no-grade contract. Pursuant to 7 C.F.R. § 46.44(a)(2), no grade lettuce at destination may contain no more than 15% condition defects, of which no more than 5% may have decay affecting any portion of the head exclusive of the wrapper leaves. The inspection report provided in this proceeding shows that there were 19% condition defects of which 6% was decay on the heads of the lettuce. Therefore, the lettuce did not make good delivery, and respondent is entitled to damages. In the determination of damages it is appropriate to view the account of sales provided by respondent which has not been contested as to validity. It shows that respondent sold the lettuce for \$4,115.50. This is the actual value of the damaged goods. It also shows that respondent had a number of expenses attached to the purchase of the lettuce, for which it claims reimbursement. It should be granted the \$2,740.00 for freight. The charges for handling, terminal charges, and an alleged commission are not compensable in a purchase and sale contract. Neither is the inspection fee reimbursable, because that is a cost to the requestor in order to ascertain the condition of the commodity. *Freshpick Foods, Inc. v. Empire Foods, Inc.*, 32 Agric. Dec. 1968 (1973). Therefore, we find that respondent may deduct \$2,740.00 for freight from the total resale price of \$4,115.50, leaving \$1,375.50 originally due and owing to complainant.⁷ Since respondent has already paid complainant \$671.38, it owes complainant \$704.12. Respondent's counterclaim for loss profits cannot be allowed because the Act does not contemplate the award of lost profits unless the seller knew at the time of sale to whom the goods were to be sold and the amount for which the goods were contracted to be sold by the buyer. *Ben Gatz Co. v. S. Albertson Co., Inc.*, 28 Agric. Dec. 1192 (1969).

In view of the above we find that respondent's failure to pay complainant \$704.12 is a violation of Section 2 of the Act for which reparation must be awarded with interest thereon at the rate of 13% per annum.

Order

Within 30 days from the date of this order respondent shall pay the complainant \$704.12 with interest thereon at the rate of 13% per annum from April 1, 1986, until paid.

⁷This computation achieved the same result as the usual method of computing damages in which freight is added to the contract price to determine market value, and the price on resale is deducted. Thus, \$3,426.75 plus \$2,740.00 equals \$6,166.75 less \$4,115.50 which is \$2,051.25, the amount of damages which must be deducted from the original contract price.

The counterclaim in this proceeding is dismissed.
Copies of this order shall be served upon the parties.

**KENT W. NORTHCROSS, d/b/a NORTHCROSS DISTRIBUTORS, INC.,
FRESH ERA PRODUCE, INC.
PACA DOCKET NO. 2-7380.**

Order Reopening the Hearing filed December 16, 1988.

Kimberly Vrana, Mosales, Arizona, for Complainant.

Frank Sutton, Clayton, Georgia, for Respondent.

Order Reopening the Hearing issued by Donald A. Campbell, Judicial Officer.

ORDER REOPENING THE HEARING

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A formal complaint was filed on June 19, 1986, against Spruton-Fresh Era, Inc., whose address was alleged to be 1285 N.W. Collier Street, Atlanta, Georgia. The complaint was sent by the Department, by means of certified mail, to Spruton, Inc., at 1285 Collier Road, Atlanta, Georgia, and it was signed for on September 30, 1986, by a William Smith. However, it appears that the Department addressed the complaint to the wrong entity, as Spruton, Inc., was not the firm named in the complaint, nor was it apparently the firm to whom complainant sold the produce referred to in the complaint. Therefore, the hearing will be reopened *sua sponte*, pursuant to 7 C.F.R. § 47.11(c), so that the complaint may be served upon the proper party.

The complaint should not have been addressed to Spruton, Inc. At the time the complaint was filed, the named respondent, Spruton-Fresh Era, Inc., was not shown as a licensee in the Department's license files. The license files did show that a license had been issued on April 8, 1985, to Spruton, Inc., located at 1285 Collier Road, Atlanta, Georgia 30318. The License records also indicated that on April 25, 1986, a license renewal application was filed by Fresh Era Produce, Inc., which stated that on October 1, 1985, Spruton, Inc., changed its name to Fresh Era Produce, Inc., and replaced many of its former principals, including its former secretary, William Smith, who left to join another firm which retained the name Spruton, Inc., but was located in Clayton, Georgia. Thus, Spruton, Inc., ceased to do business at Collier Road. Apparently, although the complaint was sent to Spruton, Inc., at Collier Road, it was directed to Mr. Smith's firm in Clayton, Georgia, and he signed for it. However, it is clear that, according to the information had by the Department at the time the complaint was filed, June 19, 1986, Fresh Era Produce, Inc., was the entity with whom complainant did business. Further, it is obvious that

although Spruton-Fresh Fra, Inc., was mistakenly named respondent, Fresh Era Produce, Inc., was the entity against whom the complaint was intended to be brought. Accordingly, the Department should have mailed the complaint to Fresh Era Produce, Inc., at 1285 Collier Road, Atlanta, Georgia, rather than to Spruton, Inc., at that address.

Therefore the hearing is hereby reopened. A copy of the complaint and report of investigation shall be served upon Fresh Era Produce, Inc. at 1285 Collier Road, Atlanta, Georgia 30318.

With regard to Spruton, Inc., since it was not named in the complaint but was served with the complaint by mistake, it is considered never to have been a party to this proceeding. Therefore, dismissal of the complaint against it is neither warranted nor necessary.

Copies of this order shall be served upon the parties.

**HENRY A. POLLAK RIVERHEAD CORPORATION, v. H. SACKS & SONS.
PRODUCE, INC.**

PACA DOCKET NO. 2-6476.

Order filed December 6, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*). Because the respondent, in its answer, noted that the complainant already was prosecuting a civil action against it in the Supreme Court of the State of New York, County of Suffolk (Index No. 87-25252) involving the same transactions, complainant was notified that, if this was so, it would be appropriate to dismiss its reparation complaint. The presiding Officer therefore, gave complainant an opportunity to show cause why its complaint should not be dismissed. Complainant, through counsel, admitted that such a civil action was being prosecuted, and failed to show cause why its complaint should not be dismissed. accordingly, we must order its dismissal.

The complaint is dismissed.

Copies of this order shall be served upon the parties.

RIGBY PRODUCE, v. METROPLEX PRODUCE CO.

PACA Docket No. R-89-19.

Order filed December 16, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$3,037.50 with interest thereon at the rate of 13 percent per annum from December 1, 1987, until paid.

Copies of this order shall be served upon the parties.

SAVAGE FARMS LTD. v. H. SACKS & SONS PRODUCE, INC.

PACA Docket No. R 88-201.

Order on Ruling on Petition for Reconsideration filed December 7, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

RULING ON PETITION FOR RECONSIDERATION

(Summarized)

The petition must be denied for the following reason: Complainant was served with the presiding officer's notice to show cause on August 23, 1988. It, therefore, only had until September 12, 1988, to file a response to it, but failed to do so. In any event, the document which it submitted with its petition, an invoice from C & J Transportation Brokers, Inc., indicating that the respondent was named as the shipper of the subject lot of potatoes by C & J, does not establish that the respondent purchased the potatoes from complainant. It still might have purchased them from "Mt. Valley."

In view of the above, respondents's petition for reconsideration is denied.

The Order of October 20, 1988, is reinstated except that it shall become effective thirty days from the date of issuance of this order.

Copies of this order shall be served upon the parties.

**SOUTHERN PRODUCE DISTRIBUTORS, INC. v. SAM RELAN d/b/a
SAM RELAN SALES.**

PACA Docket No. R-88-24.

Decision and Order filed December 7, 1988.

John Walston, Esquire, for Complainant.

Ernest G. Drake, Jr., Esquire, Ponchatoula, Louisiana, for Respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant \$9,556.79, wit interest thereon at the rate of 13% per annum from August 1, 1986, until paid.

Copies of this order shall be served upon the parties.

[This decision and order became final on December 7, 1988. - Editor]

**SOUTHERN VALLEY FRUIT SALES, INC. v. REGAN DISTRIBUTORS,
INC.**

PACA Docket No. R-88-237.

Order filed December 16, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

This reparation proceeding under the perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*)

By letter dated November 16, 1988, the parties notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in the letter November 16, 1988, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

**SOUTHERN PRODUCE CO., d/b/a WESTERN FRUIT SALES CO. v.
MICHAEL PREVOR & SYDNEY PREVOR d/b/a MARKETING INT'L.**

PACA Docket No. 2-7647.

Decision and Order filed December 7, 1988.

Craig A. Bromsky, Esq., for Complainant.

Respondent, pro se.

George D. Baker, Presiding Officer.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

(Summarized)

Within 30 days from the date of this order respondent shall pay to

complainant \$2,880.00, with interest thereon at the rate of 13% per annum from September 1, 1986, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

[This decision and order became final on December 7, 1988. - Editor]

SOUZA BROTHERS PACKING CO. v. TAYLOR BROKERAGE COMPANY, INC.

PACA Docket No. R-88-31.

Decision and Order filed December 7, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant \$343.25 with interest thereon at the rate of 13% per annum from December 1, 1985, until paid.

The counterclaim in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

WOLVERINE FRUIT OF TEXAS, INC. v. JEROME GROSSMAN d/b/a JEROME GROSSMAN BROKERAGE DIST. CO.

PACA Docket No. R-88-248.

Order of Dismissal filed December 6, 1988.

Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*).

By motion, filed simultaneously with its answer, the respondent moved to dismiss the complainant against it in this action because the complainant, which is the respondent in PACA Docket No. R-88-174, had stated the same causes of action in a formal counterclaim in that case. The presiding officer sent the complainant a letter, dated October 20, 1988, suggesting that, as PACA Docket No R-88-174 was ready for order, it agree to dismiss the instant complaint and to allow the dispute between the parties to be resolved in the Secretary's consideration of that matter. Complainant, which was given ten days to do so, did not object to the presiding officer's suggestion.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

**REPARATION DEFAULT ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER
(Summarized)**

ABC FARMS, INC. v. DIAMOND TOMATO. CO.
PACA Docket No. RD-89-66.
Default order issued December 20, 1988.

Respondent was ordered to pay complainant, as reparation, \$27,945.50, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

ALBEE TOMATO CO. v. J. PANDEL & SON INC.
PACA Docket No. RD-89-70.
Default order issued December 20, 1988.

Respondent was ordered to pay complainant, as reparation, \$3,291.50, plus 13 percent interest thereon per annum from April 1, 1988, until paid.

BORDER HARVESTING INC. v. CERNIGLIA PRODUCE CO. INC.
PACA Docket No. RD-89-80.
Default order issued December 6, 1988.

Respondent was ordered to pay complainant, as reparation, \$13,212.75, plus 13 percent interest thereon per annum from March 1, 1988, until paid.

BORTON & SONS INC. v. PETER HROZY d/b/a PETER'S WHOLESALE CO.
PACA Docket No. RD-89-74.
Default order issued December 21, 1988.

Respondent was ordered to pay complainant, as reparation, \$10,873.00, plus 13 percent interest thereon per annum from December 1, 1987, until paid.

BRADLEY PRODUCE COMPANY v. AGRI/WEST DISTRIBUTORS INC.
PACA Docket No. RD-89-14.
Default order issued December 1, 1988.

Respondent was ordered to pay complainant, as reparation, \$10,448.35, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

BUD ANTLE INC. v. SMITHPRO BROKERAGE INC.

PACA Docket No. RD-89-46.

Default order issued December 13, 1988.

Respondent was ordered to pay complainant, as reparation, \$7,853.50, plus 13 percent interest thereon per annum from October 1, 1987, until paid.

COMMUNITY-SUFFOLK INC. v. ANDERSON FARMS INC.

PACA Docket No. RD-89-47.

Default order issued December 13, 1988.

Respondent was ordered to pay complainant, as reparation, \$39,343.00, plus 13 percent interest thereon per annum from January 1, 1988, until paid.

ETAL BONANZA FARMS INC. v. CERNIGLIA PRODUCE CO. INC.

PACA Docket No. RD-89-24.

Default order issued December 6, 1988.

Respondent was ordered to pay complainant, as reparation, \$17,552.00, plus 13 percent interest thereon per annum from March 1, 1988, until paid.

KAY ERICKSON d/b/a ERICKSON FARMS v. VERNON KENDALL BULL d/b/a KENDALL BULL FRUIT COMPANY.

PACA Docket No. RD-89-62.

Default order issued December 15, 1988.

Respondent was ordered to pay complainant, as reparation, \$1,973.30, plus 13 percent interest thereon per annum from November 1, 1987, until paid.

ED GIVEN INC. v. SELECT PRODUCE INC.

PACA Docket No. RD-89-76.

Default order issued December 21, 1988.

Respondent was ordered to pay complainant, as reparation, \$10,147.40, plus 13 percent interest thereon per annum from September 1, 1987, until paid.

FRESH WESTERN MARKETING INC. v. KANG'S FARMS INC.
PACA Docket No. RD-89-77.
Default order issued December 22, 1988.

Respondent was ordered to pay complainant, as reparation, \$24,738.00, plus 13 percent interest thereon per annum from April 1, 1988, until paid.

GOLD BELL INC. v. ANDERSON FARMS INC.
PACA Docket No. RD-89-48.
Default order issued December 13, 1988.

Respondent was ordered to pay complainant, as reparation, \$1,402.50, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

MARK L. HANESS d/b/a C J's BROKERAGE v. LESTER SUTER d/b/a SHIPCO.
PACA Docket No. RD-89-64.
Default order issued December 20, 1988.

Respondent was ordered to pay complainant, as reparation, \$22,750.00, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

HANSEN FRUIT & COLD STORAGE COMPANY v. FRED L. FREGO d/b/a JONESBORO PRODUCE.
PACA Docket No. RD-89-83.
Default order issued December 22, 1988.

Respondent was ordered to pay complainant, as reparation, \$7,005.00, plus 13 percent interest thereon per annum from April 1, 1988, until paid.

ROGER HARLOFF PACKING INC. v. FRED L. FREGO d/b/a JONESBORO PRODUCE.
PACA Docket No. RD-89-81.
Default order issued December 22, 1988.

Respondent was ordered to pay complainant, as reparation, \$5,185.00, plus 13 percent interest thereon per annum from March 1, 1988, until paid.

REPARATION DEFAULT ORDERS

**SCOTT A. JARSON d/b/a INTERWEST GROWERS v. SMITHPRO
BROKERAGE INC.**

PACA Docket No. RD-89-61.

Default order issued December 15, 1988.

Respondent was ordered to pay complainant, as reparation, \$3,819.30, plus 13 percent interest thereon per annum from December 1, 1987, until paid.

**KERN RIDGE GROWERS INC. v. MENDEZ BROS. PRODUCE COMPANY
a/t/a VEG-PACK.**

PACA Docket No. RD-89-60.

Default order issued December 15, 1988.

Respondent was ordered to pay complainant, as reparation, \$5,949.00, plus 13 percent interest thereon per annum from August 1, 1987, until paid.

LEAVENWORTH FRUIT COMPANY v. FRALEY & FRALEY INC.

PACA Docket No. RD-89-69.

Default order issued December 20, 1988.

Respondent was ordered to pay complainant, as reparation, \$8,555.15, plus 13 percent interest thereon per annum from October 1, 1987, until paid.

**M & M BANANA CO. INC. v. TOXEY G. LANDRUM JR. d/b/a TOXEY
GERALD LANDRUM JR.**

PACA Docket No. RD-89-67.

Default order issued December 20, 1988.

Respondent was ordered to pay complainant, as reparation, \$19,473.60, plus 13 percent interest thereon per annum from August 1, 1987, until paid.

**BENNY MANDELL PRODUCE INC. v. ROY ENTERPRISES INC. a/t/a
BUCK's FRUIT CO.**

PACA Docket No. RD-89-73.

Default order issued December 21, 1988.

Respondent was ordered to pay complainant, as reparation, \$19,884.75, plus 13 percent interest thereon per annum from October 1, 1987, until paid.

MURAKAMI FARMS INC. a/t/a MURAKAMI PRODUCE CO. v. FRED L. FREGO d/b/a JONESBORO PRODUCE.
PACA Docket No. RD-89-82.
Default order issued December 22, 1988.

Respondent was ordered to pay complainant, as reparation, \$8,271.25, plus 13 percent interest thereon per annum from May 1, 1988, until paid.

M. OFFUTT CO. INC. v. WAYCO CORP. a/t/a AMERITEX PRODUCE.
PACA Docket No. RD-89-15.
Default order issued December 1, 1988.

Respondent was ordered to pay complainant, as reparation, \$9,069.55, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

OSHITA MARKETING INC. v. AGRI/WEST DISTRIBUTORS INC.
PACA Docket No. RD-89-12.
Default order issued December 1, 1988.

Respondent was ordered to pay complainant, as reparation, \$2,963.00, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

PACIFIC TOMATO GROWERS v. INDEPENDENCE PRODUCE COMPANY INC.
PACA Docket No. RD-89-53.
Default order issued December 14, 1988.

Respondent was ordered to pay complainant, as reparation, \$8,241.90, plus 13 percent interest thereon per annum from October 1, 1987, until paid.

PEMBERTON PRODUCE INC. v. AGRI/WEST DISTRIBUTORS INC.
PACA Docket No. RD-89-11.
Default order issued December 1, 1988.

Respondent was ordered to pay complainant, as reparation, \$10,255.00, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

REPARATION DEFAULT ORDERS

PREMIUM FRESH FARMS v. GILL DISTRIBUTING INC.

PACA Docket No. RD-89-75.

Default order issued December 21, 1988.

Respondent was ordered to pay complainant, as reparation, \$28,228.00 plus 13 percent interest thereon per annum from April 1, 1988, until paid.

RIRIE PRODUCE INC. a/t/a WILLOW CREEK PRODUCE v. CRAIG-ANN HUNTS POINT CORP.

PACA Docket No. RD-89-57

Default Order issued December 14, 1988.

Respondent was ordered to pay complainant, as reparation, \$10,915.73, plus 13 percent interest thereon per annum from August 1, 1987, until paid.

ROBERT RUIZ INC. v. GERONIMO'S INC.

PACA Docket No. RD-89-52.

Default Order issued December 14, 1988.

Respondent was ordered to pay complainant, as reparation, \$5,813.00, plus 13 percent interest thereon per annum from March 1, 1988, until paid.

SCOTT FINKS CO. INC. v. JIM BEEMER.

PACA Docket No. RD-89-54.

Default Order issued December 14, 1988.

Respondent was ordered to pay complainant, as reparation, \$4,776.75, plus 13 percent interest thereon per annum from December 1, 1987, until paid.

SIERRA PACKING INC. v. JAMES W. BUCHANAN d/b/a J. BUCHANAN CO.

PACA Docket No. RD-89-55.

Default Order issued December 14, 1988.

Respondent was ordered to pay complainant, as reparation, \$4,551.00 plus 13 percent interest thereon per annum from September 1, 1987, until paid.

SMELTZER ORCHARD COMPANY v. MIKE SHAPIRO FROZEN FOODS INC.

PACA Docket No. RD-89-78.

Default Order issued December 22, 1988.

Respondent was ordered to pay complainant, as reparation, \$5,801.00, plus 13 percent interest thereon per annum from March 1, 1988, until paid.

SMITHPRO BROKERAGE INC. v. STEVE C. MAURO d/b/a MAURO FARMS.

PACA Docket No. RD-89-72.

Default Order issued December 21, 1988.

Respondent was ordered to pay complainant, as reparation, \$43,799.24, plus 13 percent interest thereon per annum from August 1, 1987, until paid.

SPUD EXPRESS v. ATLANTIC PRODUCE INC.

PACA Docket No. RD-89-65.

Default Order issued December 20, 1988.

Respondent was ordered to pay complainant, as reparation, \$2,200.00, plus 13 percent interest thereon per annum from June 1, 1987, until paid.

STATE WIDE SALES CO. INC. v. MARIA-NINO'S INC. a/t/a NINO'S FARMER'S MARKET.

PACA Docket No. RD-89-58.

Default Order issued December 15, 1988.

Respondent was ordered to pay complainant, as reparation, \$15,977.50, plus 13 percent interest thereon per annum from April 1, 1988, until paid.

STEINBECK COUNTRY MARKETING v. MARIA-NINO'S INC. a/t/a NINO'S FARMER'S MARKET.

PACA Docket No. RD-89-59.

Default Order issued December 15, 1988.

Respondent was ordered to pay complainant, as reparation, \$18,348.00, plus 13 percent interest thereon per annum from June 1, 1988, until paid.

REPARATION DEFAULT ORDERS

SUN FRUIT INC. v. VIC MAHNS INC.
PACA Docket No. RD-89-56.
Default Order issued December 14, 1988.

Respondent was ordered to pay complainant, as reparation, \$1,227.75, plus 13 percent interest thereon per annum from May 1, 1987, until paid.

TANITA INC. v. MENDENHALL DISTRIBUTING CO., INC.
PACA Docket No. RD-89-71.
Default Order issued December 21, 1988.

Respondent was ordered to pay complainant, as reparation, \$21,486.66, plus 13 percent interest thereon per annum from August 1, 1987, until paid.

TELLES RANCH INC. v. CERNIGLIA PRODUCE CO., INC.
PACA Docket No. RD-89-79.
Default Order issued December 22, 1988.

Respondent was ordered to pay complainant, as reparation, \$18,286.50, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

VALDES FARMS INC. v. JOHN ORTEGA d/b/a EL RANCHO PRODUCE.
PACA Docket No. RD-89-63.
Default Order issued December 15, 1988.

Respondent was ordered to pay complainant, as reparation, \$2,307.50, plus 13 percent interest thereon per annum from December 1, 1987, until paid.

TONY VITRANO COMPANY v. SKLARZ PRODUCE CO., INC.
PACA Docket No. RD-89-50.
Default Order issued December 13, 1988.

Respondent was ordered to pay complainant, as reparation, \$10,209.00, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

J. C. WATSON COMPANY v. CHAPMAN PRODUCE CO., INC.

PACA Docket No. RD-89-51.

Default Order issued December 13, 1988.

Respondent was ordered to pay complainant, as reparation, \$2,000.00, plus 13 percent interest thereon per annum from April 1, 1987, until paid.

J. A. WOOD CO-VISTA INC. v. AGRI/WEST DISTRIBUTORS, INC.

PACA Docket No. RD-89-13.

Default Order issued December 1, 1988.

Respondent was ordered to pay complainant, as reparation, \$11,126.25, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

WILLIAM M. WYRICK d/b/a WESTWIDE MARKETING COMPANY v. SKLARZ PRODUCE CO., INC.

PACA Docket No. RD-89-49.

Default Order issued December 13, 1988.

Respondent was ordered to pay complainant, as reparation, \$7,627.50, plus 13 percent interest thereon per annum from December 1, 1987, until paid.

TONY Z. ZINGALE INC. v. BORGARDT'S COUNTRY CUPBOARD, INC.

PACA Docket No. RD-89-34.

Default Order issued December 29, 1988.

Respondent was ordered to pay complainant, as reparation, \$29,253.32, plus 13 percent interest thereon per annum from February 1, 1988, until paid.

REPARATION DEFAULT ORDERS

TONY Z. ZINGALE INC., v. BOGARDT'S COUNTRY CUPBOARD, INC.
PACA Docket No. RD-89-34.

Order issued December 29, 1988 by Donald A. Campbell, Judicial Officer.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT
(Summarized)

In this a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended.

Section 47.25(e) of the Rules of Practice (7 C.F.R. § 47.25(e)) states that a default may be reopened if there is a good reason presented to justify such relief. Respondent's assertion that it has made payments is not such a good reason as respondent does not dispute the fact that it failed to pay for purchases of produce. Further, respondent has not given any reason why it failed to file a timely answer to the formal complaint.

Respondent's motion to reopen is thus without merit and is denied. A default order should, therefore, be issued.

Copies of this order shall be served upon the parties.

PLANT QUARANTINE ACT

In re: RUSTY'S FLOWERS, INC.

P.Q. Docket No. 88-37.

Order Dismissing Complaint filed December 22, 1988.

Christine O'Leary, for Complainant.

Respondent, pro se.

Order Dismissing Complaint issued by Paul Kane, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

A complaint was issued in this matter on September 19, 1988. The respondent's answer was filed October 13, 1988. This answer provided an explanation of the respondent's participation in the allegedly illegal activities. The respondent's explanation appears to have satisfied complaint counsel that the action mis-identified the person or persons responsible for the allegedly violative acts. Accordingly, complaint counsel moved to dismiss the complaint on December 20, 1988.

The Administrative Law Judge observes that the adjudicatory process is indeed a very useful method by which truths may be uncovered. However, complaint counsel should not use this process as an investigational tool, in view of the requirements of judicial efficiency. *McKart v. U.S.*, 395 U.S. 185 (1969).

The complaint in this matter is dismissed.

In re: ANDRE SOLEYN.

P.Q. Docket No. 88-17.

Decision and Order filed November 1, 1988.

Importation of mangoes from Barbados-admission of material allegations.

Christine O'Leary, for Complainant.

Respondent, pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States (7 C.F.R. § 319.56), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.* and 9 C.F.R. § 93.1 *et seq.*

This proceeding was instituted by a complaint filed on July 25, 1988, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about July 15, 1986, respondent moved mangos and sweetsop from Barbados to New York, in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the importation of such fruit from Barbados into the United States is prohibited.

In response to the complaint, respondent filed a letter dated July 26, 1988, in which he admitted moving mangos into the United States from Barbados,

but denied moving sweetsop into the United States from Barbados. For purposes of issuing this Decision and Order, the complainant has withdrawn the allegation that respondent moved sweetsop from Barbados to New York.

In view of the aforementioned facts, respondent has admitted the material allegations in the complaint, as amended, and, therefore, respondent has waived his right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent has admitted, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Respondent, Andre Soleyn, is an individual with a mailing address of 5708 Avenue H, Brooklyn, New York 11234.

2. On or about July 15, 1986, respondent moved mangos from Barbados to New York, in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the importation of such fruit from Barbados into the United States is prohibited.

Conclusion

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)). Therefore, the following order is issued.

Order

Respondent, Andre Soleyn, is hereby assessed a civil penalty of three hundred seventy-five dollars (\$375.00) which shall be made payable to the "Treasurer of the United States" by a certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final on December 13, 1988.--Editor.]

In re: VAN WELL NURSERY.

P.Q. Docket No. 88-29.

Decision and Order filed November 10, 1988.

Improper importation of Malus rootstock-admission of material allegations.

Sheila Novak, for Complainant.

Respondent, pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of nursery stock, plants, roots, bulbs, seeds, and other plant products (7 C.F.R. § 319.37), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.* and 9 C.F.R. § 93.1 *et seq.*

This proceeding was instituted by a complaint filed on August 29, 1988 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about March 31, 1988, at Oroville, Washington, the respondent imported approximately 10,000 Malus (apple) rootstock into the United States in violation of section 319.37-14 of the regulations (7 C.F.R. § 319.37-14) because the rootstock were not imported at a designated port of entry, as required. The complaint also alleged that on or about March 31, 1988, at Oroville, Washington, the respondent imported approximately 10,000 Malus (apple) rootstock into the United States, in violation of section 319.37-11 of the regulations (7 C.F.R. § 319.37-11) because the respondent failed to notify Plant Protection & Quarantine Programs of the arrival of the Malus (apple) rootstock, as required.

On September 19, 1988, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. The admission of the allegations contained in the Complaint constitutes a waiver of hearing (7 C.F.R. § 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Van Well Nursery, hereinafter referred to as the respondent, is a company with a mailing address of P.O. Box 1339, 1000 N. Miller St., Wenatchee, WA 98801.
2. On or about March 31, 1988, at Oroville, Washington, the respondent imported approximately 10,000 Malus (apple) rootstock into the United States in violation of section 319.37-14 of the regulations (7 C.F.R. § 319.37-14) because the rootstock were not imported at a designated port of entry, as required.
3. On or about March 31, 1988, at Oroville, Washington, the respondent imported approximately 10,000 Malus (apple) rootstock into the United States, in violation of section 319.37-11 of the regulations (7 C.F.R. § 319.37-11) because the respondent failed to notify Plant Protection Quarantine Programs

VAN WELL NURSERY

of the arrival of the Malus (apple) rootstock, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 319.37-14 and 319.37-11 of the regulations (7 C.F.R. §§ 319.37-14, 319.37-11).

Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of seven hundred fifty dollars (\$750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 88-29.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final on December 26, 1988--Editor.]

In re: CARLOS HERNANDEZ
P.Q. Docket No. 281
Decision and Order filed October 17, 1988

Improper handling of foreign origin garbage-Failure to file answer.

Patrice Harris Harps, for Complainant, Washington, D.C.
Respondent, pro se.

Default Decision and Order issued by Paul Kane, Administrative Law Judge

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111-120) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa *et seq.*) (Acts) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated section 94.5 of regulations (9 C.F.R. § 94.5) and section 330.400 of the regulations (7 C.F.R. 330.400) issued under the Acts. A copy of the complaint and the Rules of Practice governing proceedings under the Acts were served by certified mail on respondent by the Hearing Clerk on October 2, 1986, but were returned. A copy of the complaint and Rules of Practice were served by regular mail on respondent by the Hearing Clerk on October 16, 1986.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for an answer would constitute a waiver of an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Carlos Hernandez, herein referred to as respondent, is an individual whose address is 11430 S.W. Lane, Miami, Florida 33165.

2. On or about May 21, 1986, the respondent removed from Tan Airlines Flight TX-800, that arrived from Honduras at Miami International Airport, Miami, Florida, certain foreign origin garbage in violation of section 330.400 (b)(1) of regulations (7 C.F.R. § 330.400(b)(1) and section 94.5(b)(1) of the regulations (9 C.F.R. § 94.5 (b)(1), because the respondent failed to unload such garbage in tight, leak-proof covered receptacles, under the direction of an Animal and Plant Health Inspection Service Inspector, to an approved facility for incineration, sterilization, or grinding, as required.

Order

Respondent Carlos Hernandez is hereby assessed a civil penalty of five hundred dollars (\$500.00), which shall be payable to the "Treasurer of the

CARLOS HERNANDEZ

United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to:

USDA, APHIS Field Servicing Office
Accounting Section, Butler Square West
5th Floor, 100 North 6th Street
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 281.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of Decision and Order upon respondent, unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final December 2, 1988.--Editor.]

CONSENT DECISIONS ISSUED

DECEMBER 1988

(Not published herein--Editor)

Animal Quarantine and Related Laws

O. S. BRACKETT, JR. A.Q. Docket No. 88-30. December 8, 1988.

Animal Welfare Act

CONTINENTAL AIRLINES. AWA Docket No. 88-25. December 8, 1988.

Horse Protection Act

DEAN BYARD. HPA Docket No. 193. December 7, 1988.

JOHN ALLAN CALLAWAY, EDWARD R. BREEDLOVE, AND
RICHARD MACDONALD. HPA Docket No. 88-50. December 8, 1988.

TY IRBY. HPA Docket No. 88-40. December 8, 1988.

JIM LANDERS AND JACK KINKADE. HPA Docket No. 88-16.
December 13, 1988.

BETSY MCCALL AND JIM VAUGHN. HPA Docket No. 88-11.
December 22, 1988.

MATTHEW F. MCWILLIAMS. HPA Docket No. 88-5. December 8, 1988.

ELIZABETH MANSFIELD AND ROGER IVINS. HPA Docket No. 88-37.
December 8, 1988.

ROBERT GREGORY PATE, GREG PATE STABLES, CHARLES
BROWN, RONALD ELROD, AND PEARL PUTMAN. HPA Docket No.
88-60. December 7, 1988.

MR. AND MRS. SEDGIE RAY PITTMAN AND BILLY C. CANTRELL.
HPA Docket No. 88-55. December 9, 1988.

JAMES WOODBURN. HPA Docket No. 88-24. December 20, 1988.

Packers and Stockyards Act

DONOHOO BEEF COMPANY, INC. P&S Docket No. D-88-95.
December 9, 1988.

NORMAN GRAY. P&S Docket No. D-89-12. December 19, 1988.

PATSY L. LEONE, JR. P&S Docket No. D-89-8. December 8, 1988.

TOMMY MAYBERRY. P&S Docket No. D-89-10. December 19, 1988.

LIVESTOCK, INC., RALPH RANDALL MOODY, AND
CHILDRESS. P&S Docket No. D-88-42. December 7, 1988.

ARAB STOCKYARD, INC. P&S Docket No. D-88-51.
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ET AND CONTINENTAL AIRLINES.
December 22, 1988.

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